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No. 95-2055

In The

Supreme Court of the United States

October Term, 1995

RICHARD C. ANGINO and
ALICE K. ANGINO,

Petitioners,

vs.

BOARD OF SUPERVISORS OF
MIDDLE PAXTON TOWNSHIP,

Respondent.

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

BRIEF IN OPPOSITION OF RESPONDENTS

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TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE CASE..... 1

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI..... 4

I. This case was decided in a way that is consistent with this Court's decisions regarding land use regulation effecting a "taking" for purposes of the Fifth Amendment, and there are therefore no special and important reasons warranting the issuance of a writ of certiorari..... 4

II. There was substantial evidence before the Board to support its conclusion that a grant of the variance requests posed significant public safety hazards and would be contrary to the public interest 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASE LAW

Agins v. Tiburon, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980) 7

Andrus v. Allard, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979) 9

Application of Devereux Foundation, 351 Pa. 478, 41 A.2d 744 (1945), *appeal dismissed*, 326 U.S. 686, 66 S. Ct. 89, 90 L. Ed. 403 (1945) 10

City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989) 10

Dishler v. Zoning Board of Adjustment of Cheltenham Township, 414 Pa. 244, 199 A.2d 418 (1964) 10

Dolan v. City of Tigard, ___ U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) 6

Filanowski v. Zoning Board of Adjustment, 439 Pa. 360, 266 A.2d 670 (1970) 10

Hasage v. Philadelphia Zoning Board of Adjustment, 415 Pa. 31, 202 A.2d 61 (1964) 10

Kaiser Aetna v. United States, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) 6

Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) 7, 9

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) ...6, 7

MacDonald, Sommer & Frates v. County of Yolo, et al., 477 U.S. 340, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986) 8

TABLE OF AUTHORITIES – Continued

Page

Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887) 9

Nollan v. California Coastal Commission, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987) 6

Swade v. Zoning Board of Adjustment of Springfield Township, 392 Pa. 269, 140 A.2d 597 (1958) 10

STATUTES AND RULES

Subdivision and Land Development Ordinance for Middle Paxton Township

§ 501.g 2

§ 501.i 2

§ 501.k.1 2

Supreme Court Rule 10 ..... 4, 5

COUNTER-STATEMENT OF THE CASE

Petitioners Angino (the "Anginos") purchased 52 acres of land in 1971, on which they built their home. In 1979 the Anginos received approval from the Board of Supervisors of Middle Paxton Township (the "Board"), the respondent in this case, to build a house and a private road on a ten acre tract of the land located along State Highway Route 443. The house and the road were built.

On October 26, 1990 the Anginos submitted to the Township a Preliminary/Final Subdivision Plan (the "Plan") for development of a five-lot subdivision of the ten-acre tract, to be known as Fishing Creek Acres. The lots in the subdivision would be accessed by the private road that had been built in 1979. This road was already being used by large trucks to access the Anginos' nursery, which was located on another portion of the Anginos' property.

The ten-acre plot of land to be developed consists of a rectangle of approximately 11 acres which runs east and west along the north side of State Highway Route 443 (Fishing Creek Valley Road). The land is steeply inclined, with slopes of 15%-25%, and is predominantly wooded. Because of the nature of the land, and because of the location of the house that had already been built, the Anginos' Plan requested several variances from the requirements of the Township's Subdivision and Land Development Ordinance (the "Ordinance").

Pursuant to the Ordinance, the Plan was sent to the Township's Planning Commission for review and comment. The Planning Commission identified 24 changes necessary to bring the Plan into compliance with the Ordinance. At the Anginos' request, the consideration of

the Plan was then put on hold so that the developer could address the Planning Commission's concerns.

On March 28, 1991 the Anginos submitted a revised Preliminary/Final Subdivision Plan. The revised Plan provided for four lots in addition to the already-existing lot, and asked for several variances from the Ordinance. The revised Plan requested a cul-de-sac length of 750 feet, whereas § 501.i of the Ordinance limits cul-de-sacs to 500 feet. The Anginos' revised Plan proposed an 18 foot wide street with a 90 degree curve with a radius of 40 feet, whereas § 501.g of the Ordinance requires a center line radius of 150 feet on all curves on minor public streets. Finally, the Anginos requested side slope banks of 1 to 1, whereas § 501.k.1 of the Ordinance requires side slope banks of 3 to 1 (3 feet of horizontal measurement for every 1 foot of vertical measurement). The revised Plan was denied by the Board on May 15, 1991 because the requested variances were significantly in excess of Ordinance requirements.

The Anginos appealed to the Dauphin County Court of Common Pleas, which affirmed the Board's decision. The Anginos then appealed to the Commonwealth Court of Pennsylvania which remanded to the Dauphin County Court for remand to the Board for a more detailed decision. The Board held a public hearing on July 19, 1993 and again denied the Plan by a two-to-one decision. On September 22, 1993, the Board sent the Anginos a three page letter detailing the reasons for the denial.

The requested variances were denied principally because of the mix of traffic that would exist on the road going through the development. The Anginos own a

nursery, which is located on another portion of their property, and the trucks going to and from the nursery use the road that goes through the proposed new development. If the requested variances were granted, the road would not be safe. The main reason the road would not be safe is because of the variance the Anginos had requested as to minimum center line curve radius.

A minimum center line curve radius requirement is designated in order to provide for a free flowing movement of traffic along the road, and to allow for the proper site distances that are necessary to see oncoming traffic, crossing traffic, and traffic entering from driveways, taking into consideration the types of traffic that will be using the road, including consideration of potential future use. Obviously, there should be no curves that are so sharp as to cause encroachment by traveling vehicles into the oncoming lane of traffic.

The Ordinance sets a minimum center line curve radius at 150 feet, which is the generally accepted minimum for center line radii. The Anginos requested a variance allowing a curve radius of only 40 feet, which would make the curve of the road almost four times as sharp, which makes a huge difference in the negotiability of and maneuverability around the curve.

There was ample testimony at the hearing before the Board that trucks negotiating the curve of the road would encroach on the oncoming lane of traffic. Given this fact, combined with the mountainous terrain of the land in question, and the possibility of icy conditions in winter and wet conditions in autumn and spring, it is obvious that the variances proposed by the Anginos are not safe.

The Board offered to grant all three of the Anginos' requested variances if the Anginos agreed to allow the nursery trucks to access the nursery by way of the Anginos' private drive rather than by using the road through the development. The Anginos were adamant, however, that the trucks must not use their private drive to access the nursery.

The Anginos again appealed the Board's decision to the Dauphin County Court of Common Pleas. On September 16, 1994 the Court of Common Pleas, by the Honorable Jeannine Turgeon, granted the Anginos' appeal and reversed the Board's decision. The Board appealed to the Commonwealth Court, which reversed the decision of the Court of Common Pleas by Order and Opinion dated August 8, 1995. The Anginos' request for reargument was denied on October 2, 1995, and their petition for allowance of appeal to the Pennsylvania Supreme Court was denied on March 22, 1996. Anginos have now petitioned this Court for a writ of certiorari.

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

I. This case was decided in a way that is consistent with this Court's decisions regarding land use regulation effecting a "taking" for purposes of the Fifth Amendment, and there are therefore no special and important reasons warranting the issuance of a writ of certiorari.

As provided by Supreme Court Rule 10, review on a writ of certiorari is a matter of judicial discretion, and a

petition for a writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10 sets forth the character of the reasons the Court considers in deciding whether to grant a petition for a writ of certiorari, in relevant part, as follows:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10 further states that a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

This case clearly does not involve the type of issues that warrant the granting of the Anginos' petition for a writ of certiorari. The Anginos appear to be arguing that their petition should be granted based on Rule 10(c), which states that this Court might grant a petition for a writ of certiorari where a state court has decided an important federal question in a way that conflicts with relevant decisions of the U.S. Supreme Court. The Anginos' petition must be denied, because the Commonwealth Court of Pennsylvania decided this case in a way that is completely consistent with relevant decisions of this Court.

The Anginos assert that this case involves a "practical taking" of their property in violation of the Fifth Amendment. Petition at p. 12. In support of this assertion, the Anginos cite only *irrelevant* decisions of this Court. The cases cited by the Anginos in support of their argument – *Dolan v. City of Tigard*, ___ U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); and *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) – all involve a "permanent physical occupation of the property," and in such cases this Court has "found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Nollan v. California Coastal Commission, supra*, at 831-32, 97 L. Ed. 2d at 686, 107 S. Ct. 3141. Indeed, *Nollan*, *Loretto* and *Kaiser* all refer to the "right to exclude others as one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan v. California Coastal Commission, supra*, at 831, citing *Loretto* and *Kaiser*.

The Anginos' case does not involve any kind of physical occupation of the property. Therefore, the line of reasoning in *Dolan v. City of Tigard*, ___ U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), relied on exclusively by the Anginos to argue that their case essentially involves a taking, does not apply in this case. The Anginos' argument must therefore be disregarded. When one considers the *relevant*

decisions of this Court, it becomes apparent that the Commonwealth Court decided this case in a manner completely consistent with those decisions.

This Court has held that a land use regulation *can* effect a taking for purposes of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it does not substantially advance legitimate state interests, or if it denies an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). However, the *type* of taking alleged is a critical factor in the Court's analysis. It is well-settled that a "taking" is more easily found where the interference with property can be characterized as a physical invasion rather than as an interference arising from some public program adjusting the benefits and burdens of economic life to promote the common good. *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470, 488, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). As set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982), this Court has almost invariably found that the permanent physical occupation of property constitutes a taking. However, this Court has repeatedly upheld regulations that destroy or adversely affect real property interests. *Keystone Coal Association v. DeBenedictis, supra*, at 490, 94 L. Ed. 2d 472, 107 S. Ct. 1232. This Court will rarely find a taking when the State merely restrains uses of property that are tantamount to public nuisances. *Id.*, at 491.

Because no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to abate the nuisance or harm. *Keystone Coal Association v. DeBenedictis, supra*, at 491-92, 94 L. Ed. 2d 472, 107 S. Ct.

1232. In this case, the Anginos have proposed a development plan that is clearly unsafe. The curvature of the proposed public road along which they seek to build four residences is such that the trucks traveling to and from the Anginos' nursery cannot navigate the turns in the road without encroaching on the oncoming lane of traffic. This constitutes an obvious threat to the safety of the public. Therefore, the Board has not "taken" anything by requiring the Anginos to comply with the minimum curve radius requirement of the Ordinance.

In order to successfully bring a takings claim, the Anginos must establish that the State regulation in question has essentially "taken" their property by "going too far." This Court has examined the "taking" question by engaging in factual inquiries that have identified several factors, such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action, that have particular significance in deciding whether or not a regulation has gone too far. *MacDonald, Sommer & Frates v. County of Yolo, et al.*, 477 U.S. 340, 348-49, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986). In *MacDonald, Sommer & Frates* the appellants alleged that the property upon which they had planned to build 159 residences was restricted to agricultural use by the State's action in denying all subdivision applications, and that the State had thereby taken the entire economic use of the property for the sole purpose of providing a public, open-space buffer. In *MacDonald, Sommer & Frates* this Court upheld the lower courts' rulings that the appellant's factual allegations were insufficient to make out a takings claim. The Anginos' factual allegations, then, are clearly insufficient.

In deciding whether a State action has effected a taking, this Court focuses on both the character of the action and on the nature of the interference with rights *in the parcel as a whole. Keystone Coal Association v. DeBenedictis, supra,* at 497, 94 L. Ed. 2d 472, 107 S. Ct. 1232. Where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. *Andrus v. Allard,* 444 U.S. 51, 65-66, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979). On the Anginos' property currently stand, among other things, the Anginos' residence, another residence and a private road, and the Anginos' nursery. When viewing the interference with the Anginos' rights in their parcel of property as a whole, it is clear that the State action in this case did not "go to far."

All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Mugler v. Kansas,* 123 U.S. 623, 665, 31 L. Ed. 205, 8 S. Ct. 273 (1887). While each of us is burdened somewhat by States' restrictions on the uses we can make of our property, we benefit greatly from the restrictions that are placed on others. *Keystone Coal Association v. DeBenedictis, supra,* at 491, 94 L. Ed. 2d 472, 107 S. Ct. 1232. The Aginos have been able to put their parcel of property to many good uses. The fact that they have not been permitted to develop four lots along an unsafe road does not arise to the level of a taking. Considering the potential injury to the community, and considering the Anginos' rights in their parcel of property as a whole, the restriction on the Anginos' use of their property has not "gone too far."

In fact, the restrictions placed on the Anginos' use of their property by the Board are minimal indeed. It is well-settled Pennsylvania law that the power to grant variances should be sparingly exercised, only where peculiar and exceptional circumstances exist. *Hasage v. Philadelphia Zoning Board of Adjustment*, 15 Pa. 31, 202 A.2d 61 (1964); *Application of Devereux Foundation*, 351 Pa. 478, 41 A.2d 744 (1945), *appeal dismissed*, 326 U.S. 686, 66 S. Ct. 89, 90 L. Ed. 403 (1945). An applicant for a variance has the burden of proving that an unnecessary hardship, unique to the particular property and precluding the proposed development, will result if the variance is not granted, and that the proposed use will not be contrary to the public health, safety, or general welfare. *Filanowski v. Zoning Board of Adjustment*, 439 Pa. 360, 266 A.2d 670 (1970); *Swade v. Zoning Board of Adjustment of Springfield Township*, 392 Pa. 269, 140 A.2d 597 (1958). Mere economic hardship will not in and of itself justify the grant of a variance. *City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh*, 522 Pa. 44, 559 A.2d 896 (1989); *Dishler v. Zoning Board of Adjustment of Cheltenham Township*, 414 Pa. 244, 199 A.2d 418 (1964). An undue hardship must be due to an inherent characteristic of the land. Any other type of "hardship" is economic or self-inflicted. *Filanowski v. Zoning Board of Adjustment*, 439 Pa. 360, 266 A.2d 670 (1970).

In this case, the hardship associated with the minimum curve radius requirement is economic and/or self-inflicted in nature, because the Anginos now own virtually all of the land surrounding the subdivision area, and can explore other entrances to the development. In order to develop the four lots as the Anginos propose,

they need only re-build the road to meet the minimum curve radius requirements, or propose an alternate route for access to the four lots, or agree to allow the nursery trucks to use their private drive. Thus, due to the Board's valid concern for public safety, the Anginos are very minimally restricted in the use of their property.

It is clear then, that the Pennsylvania Commonwealth Court decided this case in a way that is consistent with this Court's decisions regarding land use regulation effecting a "taking" for purposes of the Fifth Amendment, and that there are no special and important reasons warranting the allowance of appeal in this case. The Anginos' petition for a writ of certiorari must therefore be denied.

II. There was substantial evidence before the Board to support its conclusion that a grant of the variance requests posed significant public safety hazards and would be contrary to the public interest.

The remainder of the Anginos' argument relates to factual issues. The Anginos assert that the Board's findings in this case were not supported by substantial evidence. However, there was abundant evidence supporting the Board's decision to deny the variances requested by the Anginos. Each requested variance posed a safety threat to the public. Of primary concern to the Board is the minimum curve radius requirement, because of the mix of traffic that would exist on the proposed road. There would be large trucks going to and from the Anginos' nursery, and there would be residential traffic going to and from the houses on the lots. If the variance request as to minimum curve radius were granted, there

would be a threat to public safety in that the trucks would not be able to navigate the road without encroaching on the opposing lane of travel, therefore creating the possibility of head-on collisions.

The Anginos provide no basis for their argument that the development they propose would not result in an unsafe mix of traffic on the road. They merely assert that the trucks are already using the road, and that there are not many of them. The Anginos completely ignore the potential effects of the addition of traffic from four residences. Reflecting a stunning double standard, the Anginos state that safety is the reason they rejected the Board's offer to approve the plans if the Anginos would agree to let the trucks access the Anginos' nursery by way of the Anginos' private drive. The Anginos state that accepting the Board's offer of approval "would cause great safety problems because of the Anginos' private very narrow driveway and poor sight distance." Petition at p. 11. The existence of such safety problems in the proposed plans is precisely the reason for the Board's denial of the Anginos' requests for variances.

The Anginos appear to misunderstand the Board's concern in that they assert that because the heavy traffic to the nursery already exists, the Board should not consider that factor in its analysis of the minimum curve radius variance request. Such reasoning is illogical. The heavy traffic that already exists is the very factor that makes the proposed development unsafe. The road is sharply curved, on a steep incline, and would be used by both large trucks and passenger cars. Large trucks cannot navigate the road without encroaching on the opposite lane of travel. If the road were icy, and a truck and car

were approaching each other from opposite directions on the road, an accident would be virtually unavoidable. The Anginos find it incredible that they will not be able to develop the property as they have proposed if they cannot comply with the Ordinance. But that is clearly the law. The variances requested by the Anginos were properly denied by the Board because they represent an unacceptable compromise to the public safety.

CONCLUSION

For the foregoing reasons, the Board contends that the decision of the Commonwealth Court of Pennsylvania in this case was in full accordance with the relevant decisions of this Court. The Board, therefore, respectfully requests that this action be concluded and that the Anginos' petition for writ of certiorari be denied.

Respectfully submitted,

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